

a CONSTRUCTION, FORESTRY & MINING EMPLOYEES UNION & ANOR., RE

HIGH COURT, AUSTRALIA

MASON CJ

[S. 92/002]

28 FEBRUARY 1992

b ***CIVIL PROCEDURE:** Application for an order for prohibition - Issue - Whether existence of a dispute alleging "The unfair dismissal whether there is interstate industrial dispute within the meaning of the Industrial Relations Act 1988 to find jurisdiction in the Commission.*

c ***CIVIL PROCEDURE:** Leave to appeal against the decision to the Full Bench of the Commission - Balance of convenience - Whether the proceedings before the Commissioner should be allowed to continue pending the determination by the Full Bench - Whether arguable case - Whether there are merits.*

This was an application by Multiplex Constructions Pty. Ltd. for an order *nisi* for a writ of prohibition directed to Commissioner Grimshaw of the Australian Industrial Relations Commission and the Construction, Forestry and Mining Employees Union.

d *Inter alia*, when the matter came before Commissioner Grimshaw on 13 November 1991, Multiplex argued that there was no interstate industrial dispute within the meaning of the Industrial Relations Act 1988 (Cth) sufficient to found jurisdiction in the Commission. Commissioner Grimshaw found that there was such a dispute and that he had jurisdiction to grant the relief sought which appears to have been relief by way of reinstatement of the two employees.

e The application to this Court is brought on the ground that the Commissioner lacks jurisdiction to deal with the alleged dispute.

Held:

f [1] The learned Judge held that he had difficulty in understanding the reasons given by Commissioner Grimshaw for holding that the Commission has jurisdiction to deal with the matter and on the material before the Court, Multiplex has an arguable case that Commissioner Grimshaw was wrong on this point.

g [2] The Court held that no case has been made out to warrant the intervention of the Court at this stage of the proceedings. Prohibition does not issue as of course and, in the ordinary run of industrial cases. A single Justice of this Court should not grant an order *nisi* for prohibition unless and until the prosecutor exhausts its remedies in the Commission, in particular by way of appeal to the Full Bench and, where appropriate, by seeking that a question of law be referred to the Federal Court. There is nothing in this case, which calls for any departure from that practice.

h [3] The Court does not propose to grant an order *nisi* with a view to reconsidering the balance of convenience. In any event, the matter should proceed in the Commission until the avenue of appeal there is exhausted. At this stage, the application is without any merit and it should be refused.

[The application for an order nisi for prohibition is refused.]

For the prosecutor - Malcolm John Davies

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JUDGMENT

Mason CJ:

This is an application by Multiplex Constructions Pty. Ltd. (Multiplex) for an order *nisi* for a writ of prohibition directed to Commissioner Grimshaw of the Australian Industrial Relations Commission (the Commission) and the Construction, Forestry and Mining Employees Union (the Union). The circumstances giving rise to the application may be briefly stated. On or around 27 February 1991, Multiplex dismissed two employees who were members of the Union from a construction site where Multiplex was the builder on the ground that they had removed certain property belonging to Multiplex. Charges were brought against the two employees in connection with the alleged removal of the property. The employees were acquitted of those charges in August 1991. The Union sought reinstatement of the two employees but Multiplex refused to reinstate them. The Union gave notification of the existence of a dispute, alleging that it related to "the unfair dismissal" of the two employees.

When the matter came before Commissioner Grimshaw on 13 November 1991, Multiplex argued that there was no interstate industrial dispute within the meaning of the Industrial Relations Act 1988 (Cth) sufficient to found jurisdiction in the Commission. Commissioner Grimshaw found that there was such a dispute and that he had jurisdiction to grant the relief sought which appears to have been relief by way of reinstatement of the two employees.

Multiplex sought leave to appeal against the decision to the Full Bench of the Commission on the grounds, amongst others, that there was no dispute between the parties extending beyond the limits of New South Wales, that the dispute was not about matters pertaining to the relationship between employers and employees and that there was no dispute between the actual parties and the proceedings. The application for leave to appeal is still pending and I am informed that it is likely to be heard by the Full Bench of the Commission early in April. Multiplex also applied for a stay of operation of Commissioner Grimshaw's decision pending the hearing of the application for leave to appeal and any appeal. The application for a stay was refused by Deputy President Moore, although he acknowledged that Multiplex has an arguable case that there was a want of jurisdiction in the Commission to deal with the alleged dispute. However, as to the balance of convenience, Deputy President Moore considered before Commissioner Grimshaw pending the determination by the Full Bench of the application for leave to appeal and the appeal.

The application to this Court is brought on the ground that the Commission lacks jurisdiction to deal with the alleged dispute. Three principal reasons are assigned in support of that claim. They are:

- (1) there is no dispute between employers and employees extending beyond the limits of New South Wales;
- (2) there is no dispute between employer and employee but rather a dispute between an employer and two former employees;
- (3) that there is a dispute which is not industrial and that it does not pertain to a relationship between employers and employees. A stay of proceedings in the Commission is also sought on the ground that substantial expense and inconvenience and potential prejudice will be suffered by the prosecutor in the event that Commissioner Grimshaw proceeds to a hearing of the purported dispute.

- a** I have some difficulty in understanding the reasons given by Commissioner Grimshaw for holding that the Commission has jurisdiction to deal with the matter and on the material before me I am disposed to agree with Deputy President Moore's statement that Multiplex has an arguable case that Commissioner Grimshaw was wrong on this point.
- b** However, having said that, I am very firmly of the opinion that no case has been made out to warrant the intervention of this Court at this stage of the proceedings. Prohibition does not issue as of course and, in the ordinary run of industrial cases, a single Justice of this Court should not grant an order *nisi* for prohibition unless and until the prosecutor exhausts its remedies in the Commission, in particular by way of appeal to the Full Bench and, where appropriate, by seeking that a question of law be referred to the Federal Court. There is nothing in this case which calls for any departure from that practice. It was suggested that,
- c** if an order for reinstatement is made before the Full Bench gives its decision on jurisdiction, various difficulties might arise, including the possibility that Multiplex might be prosecuted for breach of award. At the present time, these difficulties are hypothetical. Furthermore, as it seems to me, in this case the application has been brought in order to overcome Deputy President Moore's refusal to grant a stay pending a decision of the Full Bench. That is the catalyst which has caused the application now brought before me.
- d** I certainly do not propose to grant an order *nisi* with a view to reconsidering the balance of convenience as it was considered by Deputy President Moore. In any event, I take the view that the matter should proceed in the Commission until the avenue of appeal there is exhausted.
- In my view, at this stage, the application is without any merit and it should be refused.
- e** The circumstances are such that it may be advisable for Commissioner Grimshaw to stay his hand before making an order which is finally operative until the substantial question as to the propriety of exercise of jurisdiction by the Commission in this matter is determined by the Full Bench. The making of an operative order for reinstatement might create difficulties if it should transpire subsequently that it is made without jurisdiction. However, in making this comment, I have not had the advantage of hearing what the Union has to say. It is therefore a matter for the Commission to consider for itself.
- f** In the result, the application for an order *nisi* for prohibition is refused.

Also found at [1992] 2 CLJ 1122

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